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IN THE

Supreme Court of the United States

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

vs.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

BRIEF OF RESPONDENTS

Charles S. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinor Prouty Mallory and Third National Bank & Trust Company file this brief in opposition to the Petition of Citizens Utilities Company for Writ of Certiorari to the Supreme Court of the State of Vermont.

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Jurisdiction

The jurisdiction of the United States Supreme Court does not include review of state court decisions involving questions of local law outside the scope of Title 28 U.S.C. § 1257(3).

Thus, where the validity of a treaty or statute of the United States is *not* drawn in question, and where the validity of a state statute is *not* drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and where *no* title, right, privilege or immunity is especially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, the decision of the state court is not subject to review by *certiorari* here under the provisions of title 28 U.S.C. § 1257(3).

In the instant case, the validity of federal law was recognized and upheld. Moreover, petitioner claimed and had acquired no rights under any federal law.

Statutes Involved

In addition to the statutes set forth in the Petition, 16 U.S.C. §814 reads as follows:

"§ 814. *Exercise by licensee of power of eminent domain*

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 10, 1920, c. 285, §21, 41 Stat. 1074."

30 Vermont Statutes Annotated §115 provides:

"§115.—*Scope of application*

"Without limiting or enlarging the scope of sections 109-114 of this title, it is hereby specifically provided that they shall apply to the condemnation of rights to

construct and maintain pipe lines, conduits, lines of poles, towers or wires, and to rights to appropriate, divert and flow back water." Vol. 8, page 125.

Questions Presented.

The Vermont Supreme Court decided that the state Public Service Commission had no jurisdiction.

The real questions presented are:

1). Is or is not the decision of the highest state court as to the jurisdiction of the Vermont Public Service Commission state law and as such to be treated as an act of the Vermont legislature?

2). Does the holding that the Vermont Public Service Commission had no jurisdiction to grant condemnation involving dams, conduits and the privilege of diverting and flowing back water of a navigable stream or other water of the United States to a would-be-condemnor, lacking a license from the Federal Power Commission, conflict with the constitution or any treaty or law, of the United States or any title, right, privilege or immunity thereunder?

No application for reargument or rehearing before the Vermont Supreme Court and no application for a stay of final judgment was ever filed by the Petitioner either with the Vermont Supreme Court or the Public Service Board. (Respondents' Appendix G, page 1a, and Respondents' Appendix H, page 2a). Neither has there been any application for a stay pursuant to Rule #27 of this Court.

Statement

The Vermont Supreme Court did not accept the conclusion of the Public Service Board that petitioner possessed all authorizations required under the Vermont Statutes, as petitioner erroneously asserts in its brief pages 6 and 13. Instead the Opinion states:

"The certificate of public good mentioned in 30 V.S.A. §111(1) is issued by the Public Service Commission after a hearing on a proposed project and a determination by the Commission that the proposed project is for the benefit of the people of the State of

Vermont: 10 V.S.A. §706. The petitioner has no certificate of public good in the instant case * * *" (Appendix pp. 6a, 7a)

Later in its opinion the Vermont Supreme Court said:

"A private corporation has no right to eminent domain in the absence of a delegation of such power to it from the sovereign by virtue of constitutional or statutory provisions. 29 C.J.S. Eminent Domain §24 p. 813. See *George* v. *Consolidated Lighting Co.*, 87 Vt. 111. The statutory provisions of 30 V.S.A. §111(1) grants the right of eminent domain to a private corporation before the Public Service Commission provided that such corporation has a certificate of public good from the State, or a license from the Federal Power Commission. The certificate of public good is the vehicle by which the State of Vermont delegates the ri[illegible] eminent domain to a private corporation, just as [illegible] license from the Federal Power Commission serves as the delegation of such power on the part of the United States." (Appendix B, pages 10a, 11a).

Nowhere in the record is there anything to suggest that petitioner had complied with the valid requirement of the state statute, 30 Vermont Statutes Annotated §111, that it have a state certificate of public good authorizing the project or a license from the Federal Power Commission. It had neither. (Appendix B, pages 7a, 11a; Appendix C, page 24a).

There are some errors and unwarranted misstatements in the Appendix and statement of the case which should be corrected at this point.

The citation to 29 C.J.S. Eminent Domain of the Appendix page 11a should read "Section 24 page 813" and not "page 12" as there appears.

The statements in the Petition, page 6, in the second paragraph, with respect to the antiquity of the penstocks and the use of the water from Clyde Pond dam, are quite erroneous and utterly misleading, creating the impression, as they evidently are intended to do; that the development in question was in use prior to the passage of the Federal Power Act which was enacted June 10, 1920.

According to the findings of the Vermont Public Service

Board, the Clyde Pond dam was not constructed until 1921 or 1922. The original penstock was not extended upstream to the Clyde Pond dam until 1940. (Appendix C page 20a).

The other penstock six feet in diameter was built in 1931 (Appendix C page 20a) *after* the lease in question and *not before*, as the Petition erroneously states. Therefore, the statements as to the time of construction in this paragraph on page 6 of the Petition are both false and misleading.

Summary of Argument

The sovereign power of eminent domain is legislative in character. It may be delegated as here to a tribunal created by the Vermont legislature, namely, the Public Service Board. The extent of the jurisdiction and power thus delegated is subject to the legislative fiat. Hence, any question as to the jurisdiction of the Public Service Commission in eminent domain proceedings is fundamentally one of state law.

The Vermont legislature has recognized the authority of the United States pursuant to the Federal Power Act, by making a license from the Federal Power Commission in the case of interstate waters, and a certificate of public good from the state commission in the case of intrastate waters, a prerequisite to the exercise of the power of eminent domain. Petitioner has no standing to question by certiorari the interpretation and application of this statute made by the Vermont Supreme Court because it had no federal license and resisted in every way possible the authority of the Federal Power Commission and the order that it obtain such a license.

The following extracts from the opinion of the Vermont Supreme Court show adequate grounds for the dismissal of the petition for condemnation.

App. B 6a "We therefore agree with the Public Service Commission that the dam and powerhouse with which this land is associated, must be authorized under Section 111(1) of 30 VSA."

App. B 7a : The petitioner has no certificate of public good in the instant case."

App. B 5a "The report also states that the petitioner does not have the license under the Federal Power Act which it was ordered to obtain from the Federal authorities."

Those are admitted facts.

ARGUMENT

I.

The jurisdiction of the Vermont Public Service Commission in eminent domain proceedings is a question of state law.

While this proposition seems self-evident, we may properly inquire why it is so.

The power of eminent domain is an attribute of sovereignty inherent therein as a necessary and inseparable part thereof. It lies dormant until legislative action is had pointing out the occasions, the modes and the agencies for its exercise.

George v. *Consolidated Lighting Co.*, 87 Vt. 411, 89 A. 635;

In re Ely Ave., 217 N. Y. 45, 111 N. E. 266.

U. S. v. *458.95 Acres of Land*, 22 Fed. Supp. 1017.

"The question under what conditions the power of eminent domain may be exercised is purely legislative; but it is for the courts to decide whether the statutory conditions authorizing the exercise of the power exist in the particular case."

Gillette v. *Aurora R. Co.*, 228 Ill. 261, 81 N. E. 1005.

Of course, in the case of waters over which Congress has control by virtue of the commerce clause of the Constitution, the *power* to exercise the right of eminent domain is derived from the United States pursuant to the Federal Power Act. It is not gratuitously bestowed on non licensees. Moreover, the procedure in state tribunals is in accordance with local law.

As the opinion of the Vermont Supreme Court well says (Appendix B, page 11a) "A private corporation has no right to eminent domain in the absence of a delegation of such power to it from the sovereign by virtue of constitutional or statutory provisions."

Tyler v. *Beecher*, 44 Vt. 648, 8 Am. Rep. 398;
General Petroleum Corporation of California v. *Hobson*, 23 F. 2nd 349.

The Federal Practice and Procedure in condemnation proceedings must be according to forms and proceedings in state where proceedings are had, by licensees under the Federal Power Act, 16 USC §814, as in other cases, 33 U.S.C. §591, Fed. Rules Civ. Proc. rule 71A, (k) 28 U.S.C.A.

United States v. *Federal Land Bank*, 127 F. 2nd 505.

II.

None of the issues draw in question either the Constitution or any treaty or law of the United States or any title, right, privilege or immunity thereunder.

The petitioner did not traverse or deny the plea filed by these respondents as to the jurisdiction of the Vermont Public Service Commission (Respondents' Appendix I page 4a). This plea alleged that the Clyde River was a navigable stream and waters of the United States and that Citizens Utilities Company was seeking to condemn real estate, water power, dam, and water privileges on that River and had never applied for or obtained a license pursuant to the Federal Power Act or a permit or valid existing right of way granted prior to June 10, 1920. The Public Service Commission treated this plea as insufficient and summarily denied it.

In view of this record, respondents say:

(1) That the petitioner, Citizens Utilities Company, has not drawn in question the validity of any statute of the United States; (2) Petitioner has not drawn in question the validity of any state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States; (3) Petitioner makes no claim to any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States as required by 28 USC §1257. Instead, petitioner has at all times questioned the validity of the orders of the Federal Power Commission and has opposed though unsuccessfully, the assertion of any jurisdiction over the river by the Federal Power Commission. Thus, petitioner has failed to point out whereby it has any rights under the Federal Power Act or any other law of the United

States which have been violated or impaired by the decision of the Vermont Supreme Court. In as much as the petitioner, Citizens Utilities Company, lacks any license from the Federal Power Commission and has consistently opposed all action of that Commission requiring it to apply for a license, it certainly did not have any rights under the Federal Power Act as a non-licensee. (Appendix E page 49a; Appendix F page 52a; Respondents' Appendix J page 10a; Respondents' Appendix K page 11a; Respondents' Appendix L page 13a).

The decision of the Vermont Supreme Court does not go beyond its jurisdiction. It does not in any manner whatsoever trespass upon the jurisdiction of the Federal Power Commission. Hence, it presents no substantial federal question. There is no challenge to any federal jurisdiction or right.

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120, 127, 89 L. Ed. 2092;

S. R. A. Inc. v. *State of Minnesota*, 327 U. S. 558, 565-566, 90 L. Ed. 851;

Lake Erie, etc., R. Co. v. *State Public Utilities Commission*, 249 U. S. 422, 424, 63 L. Ed. 684.

III.

Although the artificial questions framed in the petition for certiorari, page 3, are all questions of local law, the Vermont Supreme Court correctly answered these questions in the affirmative and in accordance with applicable law, because the Clyde River is navigable, for

1) The Vermont Statute, 30 VSA §111(1), according to the holding of the Supreme Court, requires a license from the Federal Power Commission upon a navigable stream over which the Federal Power Commission has jurisdiction before eminent domain proceedings may be maintained. (Appendix B, page 12a).

While the Vermont statute specifies either a state "certificate of public good authorizing the project" or "a license from the federal power commission," they are not in any given case the equivalent of each other, in the sense that (1) a state certificate equals a federal license in the case

of *interstate* waters over which Congress and the Federal Power Commission have jurisdiction, and (2) a federal license may be substituted for a state certificate as respects purely *intra*state streams.

Bellows Falls Hydro Electric Corp., 114 Vt. 443 at 445, 448, 47 A. 2nd 409, 49 A. 2nd 561;

Minnesota Canal & Power Company v. *Pratt*, 101 Minne. 197, 234, 112 N. W. 395.

The latter was a condemnation case. The opinion of the Minnesota Supreme Court is squarely in point here, for it held that under Section 9 of the Rivers and Harbors Act, now 33 U. S. Code Section 401, a public service corporation has no right to exercise the power of eminent domain in furtherance of an enterprise affecting navigable waters without first having obtained the approval of the Federal Government.

The Minnesota Court there said:

"The courts of this state are asked in this proceeding to say that the enterprise is proper, and to authorize the petitioner to proceed without complying with the acts of congress. Before the prayer of the petition can legally be granted, the court must say that the enterprise is authorized by law. This it cannot do until the petitioner shows that it has complied with the conditions of the act of congress."

2) The Vermont Supreme Court was required by both state and federal law to dismiss the condemnation proceeding because the petitioner lacked the requisite federal license.

Niagara Falls Power Company v. *Federal Power Commission*, 137 Fed. 2d 787, 791, certiorari denied, 320 U. S. 815.

There, the Power Company relied upon the fact that at the time it applied for a federal license, it already had a permit issued by the State of New York. L. Hand, Judge, rejected this contention and held that no prescription could run against the United States and that the State's permit being beyond its power did not give the Company any right to seize upon the energy of the nation's streams, or to impair their navigability.

Judge Hand remarked—"It would have been a groundless compunction which should have protected 'permits,' 'rights of way,' or 'authority' granted by municipalities or states." • • • "What equitable claim then has a company which relies upon the grant by a state of something beyond its power? What standing does a state's license give it to seize upon the energy of the nation's streams or to impair their navigability?"

There is ample judicial authority in addition to the statute, 16 USC §814, demonstrating the necessity for a license.

> "Authorization of this project, therefore, is within the exclusive jurisdiction of the Federal Power Commission, unless that jurisdiction is modified by other federal legislation."
>
> *Federal Power Commission* v. *State of Oregon*, 349 U.S. 435, 445, 99 L. ed. 1215.
>
> "'The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain'."
>
> *Tuscarora Nation* v. *Power Authority of State of New York*, 257 F. 2nd, 885, 894, cert. den. 358 U. S. 841, 3 L. Ed. 2nd 76, 79 S. Ct. 66, rehearing denied 360 U. S. 923, 3 L. ed. 2nd 1538, 79 S. Ct. 1431.
>
> ". . . a license is a pre-requisite in that water rights under state law in a navigable stream may not be exercised without one. . . ."
>
> *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 202 F. 2nd, 190 at 207, affirmed 347 U. S. 239, 98 L. ed. 666, 74 S. Ct. 487.
>
> "Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license."
>
> *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 424, 85 L. ed. 243, 61 S. Ct. 291.

None but licensees are authorized by §21 of the Federal Power Act to exercise the right of eminent domain.

16 USC §814.

The Federal Power Act applies to dams constructed before its passage. It was so held in *Wisconsin Public Service Commission v. Federal Power Commission*, 147 F. 2d 743. There "the utility corporation makes the point that since authority to construct and maintain the dam had been granted by the State of Wisconsin, it constituted a permit for the reconstruction of the dam and the Commission was without power to require the corporation to take out a license under the Federal Power Act." This contention was rejected by the Court because to accept it would be to disregard the plain language of Section 23 of the Act, 16 U.S.C. §817.

Petitioner's argument of its Point I, (pages 12-17) proves that no federal question is before this court. Thus, the statement in the Petition for writ of certiorari (page 14) that "no conflict had ever arisen between the Public Service Commission of Vermont and the Federal Power Commission with reference to condemnation" and the further statement (page 15) "condemnation is one of the subjects which the Federal Power Act confirms may be left within the jurisdiction of the states," both constitute admissions that no real federal question is presented here.

Again on page 17 Petitioner says "condemnation by the Vermont Public Service Commission could not interfere in the slightest with the exercise by the Federal Power Commission of the powers and remedies conferred upon it by statute." While respondents are not prepared to agree that this sweeping assertion is true, certainly a necessary corollary is that: The denial by the state commission of condemnation to a petitioner, having no license from the Federal Power Commission, whether for lack of jurisdiction or some other reason, does not interfere in the slightest with the exercise of the functions and powers of the Federal Power Commission.

Indeed, there seems to be no sense in petitioner's presentation and argument of its Point I. It is wholly immaterial and irrelevant. At no time in this long litigation has the failure of the Federal Power Commission to direct Citizens to discontinue operations or to halt its condemnation proceeding been the subject of contention by either

party. Neither did petitioner nor respondents raise either of those points in the proceedings before two state tribunals, and the opinion of the Vermont Supreme Court makes no mention of them. No reference to them, express or implied, has been made heretofore during this lengthy litigation. They are extraneous matters having no bearing whatsoever upon the question which was before the Vermont Supreme Court; namely, whether the Vermont Public Service Commission had jurisdiction of the eminent domain proceeding in the admitted absence of both a public good certificate and a license from the Federal Power Commission, one of which at least was required by the Vermont Statute in order to give the Vermont Public Service Commission jurisdiction over an eminent domain proceeding. The quotations from their brief on pages 12 and 13 in the Petition for Certiorari show that the contention of respondents was that Clyde River was subject to the jurisdiction of the Federal Power Commission because it was navigable. That question was already *res adjudicata* at the time the Vermont Public Service Commission made its first findings on August 26, 1960. (Appendix C page 19a; *Citizens Utilities Company* v. *Federal Power Commission*, 295 F. 2d 959; Respondents' Appendix L page 13a).

The main question litigated throughout all previous proceedings has been whether the Federal Power Commission had jurisdiction of Clyde River as a navigable water or a stream which affected navigable waters. This question is not present in this certiorari proceeding, for the reason that it is *res adjudicata*.

The issue of jurisdiction in the Federal Power Commission over Clyde River is now a closed book, since both the Circuit Court of Appeals and the Vermont Supreme Court have either upheld or recognized that jurisdiction. It has been settled that the Federal Power Commission did have jurisdiction over the entire river since the decision of the Circuit Court of Appeals May 24, 1960. (Appendix F page 52a; Respondents' Appendix L page 13a).

Citizens Utilities Company v. *Federal Power Commission*, 279 F. 2d 1;

See also same case 295 F. 2d 959.

It is equally certain that the jurisdiction of the Vermont

Public Service Commission in eminent domain proceedings, both by state and federal law, depends upon the production of a license from the Federal Power Commission. Consequently, the fact that the Federal Power Commission did not interfere with the proceedings before the Vermont Public Service Commission, of which petitioner makes so much (Petition pages 12-14), has no bearing. It would have been improper for the Federal Power Commission thus to interfere with the proceedings before the Public Service Commission. The opinion of the Vermont Supreme Court makes no mention of any claim by the petitioner that some action should have been sought before and relief granted by the Federal Power Commission in order for the Vermont Court to justify its decision. If such a claim was made by the petitioner in its brief and in argument before the Vermont Supreme Court, it was ignored by that Court in the opinion, evidently because it was considered too frivolous to warrant attention.

No act of Congress could give a state court or other tribunal jurisdiction of a condemnation proceeding unless the state legislature had first delegated this function, which is legislative in character, to some state court.

Vermont passed a law which gave the Public Service Commission jurisdiction of eminent domain proceedings only in case a State public good certificate or a Federal license had first been issued. It is undisputed that neither was issued in this case. The only question therefore is the applicability of this Vermont statute. As already pointed out page 7 of this brief, federal condemnation proceedings must be in accordance with state law. By initiating this proceeding Citizens invoked the Vermont statute, and now it claims that the Vermont tribunals are not authorized to decide questions relating to their own jurisdiction because of the Federal Power Act. The claim is unreasonable and wrong.

What rights has Citizens Utilities Company under the Federal Power Act? Certainly none, because it has consistently opposed the jurisdiction and contested by appeal and in every possible way the orders of the Federal Power Commission.

3). The petitionees in a condemnation proceeding have

an undoubted right to raise the question of jurisdiction in the tribunal where the case is pending.

Their property cannot be taken except by due process of law pursuant to the Vermont Constitution.

Stearns v. *City of Barre*, 73 Vt. 281, 291, 297.

Failure to comply with the requirements of state law is a good defense to the taking.

United States v. *37.6 Acres of Land*, 126 F. Supp. 789.

The condemnation proceedings, before the Vermont Public Service Commission were judicial in character to the extent that "every question may be raised by the land owner and there and then determined which affect his rights."

In re City of Buffalo, 139 N. Y. 422, 34 N. E. 1103.

Statutes authorizing the taking of public property for private use must be strictly followed.

Cincinnati v. *Vester*, 281 U. S. 439, 448, 74 L. Ed. 950;

Crawford v. *Bridgeport*, 92 Conn. 431, 103 A. 125.

In fact, want of jurisdiction may and should be raised by the court of its own motion, as was done in Bellows Falls Hydro-Electric Corp., *supra*, at pages 444, 445.

There the Vermont Supreme Court in referring to the Federal Power Act, 16 USCA §791a et seq. said "this court is bound to take judicial notice of all provisions of that Act which apply to the subject matter of the petition." Thus, the Vermont Court considered itself bound to read and apply the law even though the respondents, as petitioner's brief argues, might have no standing or business to request the Court to observe the law.

Petitioner's Point II is based upon the proceedings before the Federal Power Commission in which the respondents took no part. Apparently petitioner misunderstands the position of the respondents when it argues that they relied primarily upon the fact that petitioner had violated certain orders of the Federal Power Commission. While it is true that Citizens Utilities Company had not complied with the orders of the Federal Power Commission with respect to filing an application for a license, the respondents, as their plea shows, challenged the jurisdiction of the state commission upon the ground that the river was a navigable water

of the United States. True, respondents relied upon the fact that the navigability of the river and the authority of the Federal Power Commission over the entire river had been established as *res adjudicata*. Therefore, Citizens Utilities Company, having no federal license, had completely failed to meet the jurisdictional requirements of the Vermont statute which plainly required a license from the Federal Power Commission in the case of waters subject to federal control. Moreover, by the operation of its facilities on the river without a license, Citizens Utilities was in violation of the requirements of 16 USC §817, notwithstanding the patience and forebearance of the Federal Power Commission in allowing time for the petitioner to challenge its jurisdiction and orders before complying with the requirements of this section.

Thus, it was not failure to comply with an order of the Federal Power Commission that the respondents set up as a defense depriving the Public Service Commission of jurisdiction, but rather the failure to obtain the license required by the Vermont statute and by the Federal Power Act.

In as much as the question of navigability is no longer in dispute, the opinion of the Vermont Supreme Court presents only the simple and obvious application of Vermont statutory requirements which are prerequisite to Vermont Public Service Commission jurisdiction. The opinion is also wholly consistent with the Federal Power Act provision which authorizes licensees only to prosecute eminent domain proceedings.

The petition for certiorari seems absurd and should be dismissed in view of all of the litigation that has been carried on for the last six years. As soon as the eminent domain proceeding was begun, respondents filed an action in the United States District Court to compel specific performance of the contract for acquisition of their property by Citizens and a decree was entered granting the requested relief. Citizens appealed to the United States Court of Appeals, which reversed the judgment of the District Court, on the ground that comity required that the District Court should not have decided the question of the Public Service Commission jurisdiction raised by respondents' pleading. In accordance with the decision of the Court of Appeals the eminent

domain proceedings, which had been held in abeyance by the Public Service Commission, were activated, with the result that the Public Service Commission held it did have jurisdiction, notwithstanding Petitioner lacked both a state certificate of public good and a license from the Federal Power Commission.

An appeal was taken by respondents to the Supreme Court of Vermont, which reversed the Public Service Commission and dismissed the proceedings for lack of jurisdiction. Thus, everything that the Court of Appeals said should be done to procure a determination of the jurisdictional question in the state courts has been accomplished.

Now that following the direction of the Court of Appeals, the highest state court has decided that the Public Service Commission had no jurisdiction, there is nothing further for this Court to review unless a federal question is involved. Because the question of jurisdiction depends on state law, and the Vermont Supreme Court has found that the requirements of state law with respect to a license from the Federal Power Commission have not been met, the jurisdictional question is a settled issue.

The question of primary administrative jurisdiction, briefed at pages 19 to 24 of the Petition, could have been and in fact was raised by Citizens Utilities Company by means of its briefs and in argument both before the Circuit Court of Appeals and the Vermont Supreme Court. In their respective opinions, neither of these appellant tribunals paid any attention to this question, except that the Circuit Court of Appeals directed that the question of jurisdiction over the condemnation proceedings should be determined by the Vermont Commission and state courts.

Undoubtedly, petitioner must have had its own reasons for seeking to escape the jurisdiction of the Federal Power Commission and opposing so strenuously the finding of navigability and the order requiring a license. Whatever those reasons were, Petitioner should now abide the consequences, for as the Vermont Supreme Court well said, Appendix B page 13a:

> "No question would be presented here if the petitioner had seen fit to secure the license it is under order to obtain by the Federal Power Commission."

CONCLUSION

The Vermont Supreme Court decided a jurisdictional question of state law. That decision is correct, and in accordance with applicable law, both state and federal. No federal law or right thereunder has been drawn in question. Consequently, the petition should be dismissed.

Respectfully submitted,

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